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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

MAJOR CRANE, *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, *Respondent.*

On Writ Of Certiorari To The
Supreme Court Of Kentucky

REPLY BRIEF FOR PETITIONER

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ARGUMENT

This brief is addressed to the respondent's arguments that the rule enunciated by the Kentucky Supreme Court is simply the "logical extension" of the orthodox rule and that any error committed was harmless and non-prejudicial.

It should be noted at the outset that the respondent views the petitioner's argument as challenging the constitutionality of the orthodox rule and advocating that juries be allowed to decide the voluntariness issue anew. The respondent's position is in large part premised on its misperception of the petitioner's argument.

First, the Petitioner's Brief does not contend that the orthodox rule is unconstitutional. It is only Kentucky's misapplication of that rule that has violated the petitioner's rights under the Sixth and Fourteenth Amendments. The rule adopted by Kentucky is founded on a belief that juries are incapable of making proper use of evidence. That notion is not supported by logic or experience.

Second, it is not the voluntariness of a confession that must be considered by juries in jurisdictions adhering to the orthodox rule. Rather, the jury must determine the reliability and credibility of the confession and the weight it is to be given. The jury cannot constitutionally be prohibited from fulfilling this traditional function simply because the same evidence establishes a confession's voluntariness as well as its credibility. As stated in the Petitioner's Brief, such restrictions are unconstitutional.

The argument headings set forth by the respondent will be utilized by the petitioner for the purpose of this reply.

IA

**ARGUMENT THAT TRIAL COURT'S RULING DID NOT
DENY DUE PROCESS OF LAW OR VIOLATE THE RIGHT
OF CROSS-EXAMINATION.**

The respondent's argument that no constitutional error occurred herein is premised on its erroneous belief that the rule enunciated by the Kentucky Supreme Court is a "logical extension" of the orthodox rule. The flaw in that argument lies in the fact that of the orthodox jurisdictions which have ruled on this particular issue, only Kentucky has sought to limit what evidence the jury hears as to the circumstances surrounding procurement of the confession. Indeed, the respondent has not refuted the Appendices attached to the Petitioner's Brief. The failure of other jurisdictions to construe and apply the orthodox rule in the manner undertaken by Kentucky strongly suggests that Kentucky's approach is not at all as logical as the respondent would have the Court believe.

A review of some of the decisions and statutes set out in Petitioner's Appendices A(1) and B(1) demonstrates the basic flaw underlying the respondent's argument.

While recognizing that the question of a confession's admissibility is one to be decided by the trial judge, the Florida Supreme Court in *Palmes v. State*, Fla., 397 So.2d 648 (1981) persuasively summarized the jury's role in considering a confession as evidence. The court held:

Once a confession is admitted into evidence . . . the defendant is entitled to present to the jury evidence pertaining to the circumstances under which the confession was made. The reason for this rule is that it is the jury's function to determine the weight to be accorded the confession in determining guilt . . . *It is conceivable that a confession, freely and voluntarily given and therefore admissible, may be untrue.*

Therefore, the defendant must be allowed to tell the jury why he made it. Id. at 653. Emphasis added.

In *State v. Hammler*, La., 312 So.2d 306 (1975), the Louisiana Supreme Court held:

The jury is the arbiter of what weight or effect shall be given to a confession, and therefore, the jury must have before it all the circumstances under which the confession was made . . . In determining evidentiary weight, the jury must necessarily again weigh the factors which bear upon the voluntary character of the statement. It is from these circumstances that the jury may draw their conclusion for according evidentiary value to the statement. *Id. at 310.*

See also *State v. Romero*, N.C. App., 286 S.E.2d 903, 905 (1983). The jury must be permitted to hear evidence of the circumstances under which the confession was procured in order to determine its weight and credibility. *State v. Pursley*, Tenn., 550 S.W.2d 949, 950 (1977) citing *Wynn v. State*, 181 Tenn. 325, 329, 181 S.W.2d 332, 333 (1944). See also, *State v. Allen*, 29 Utah 2d 88, 505 P.2d 302, 304 (1973); *People v. Evans*, 85 Ill.App.2d 290, 230 N.E.2d 20, 22 (1967). The foregoing decisions recognize that evidence of a confession's voluntariness serves a dual purpose and that evidence relevant to a confession's credibility and the weight it is to be given by the jury cannot be excluded simply because it overlaps with the issue of voluntariness.

The Supreme Court of Mississippi in *Wilson v. State*, Miss., 451 So.2d 724 (1984), articulated a very thoughtful analysis of the issue presented herein.

The admissibility of a confession . . . is to be distinguished from the issue of its credibility and its weight . . . '[T]he competency of a confession as evidence is for the court to decide as a matter of law, while the weight and credibility of a confession is for

the jury to decide along with other testimony and physical evidence . . .'

Once a confession is admitted into evidence, a defendant is entitled to submit evidence and have the jury pass upon the factual issues of its truth and voluntariness and upon its weight and credibility . . . [T]he jury may conclude that the confession, though found by the court to be voluntary, is untrue and not entitled to any weight . . . Confessions are not conclusive and may be weighed as to their credibility under the circumstances by the jury. This is a matter for the jury and not the court. *Id.* at 726.

The clear delineation that is made not only between the multiple purposes for which the same evidence may be considered, but also between the respective functions of the judge and jury, supports the petitioner's argument that he was constitutionally entitled to present evidence of his confession's credibility for the jury's consideration notwithstanding the fact that the same evidence was used to establish the confession's voluntariness.¹ Therefore, it cannot be found that the rule enunciated by Kentucky in the case at bar constitutes a "logical extension" of the orthodox rule.

Much of the respondent's argument in Part IA of its brief is devoted to an exegesis of the rationale underlying

¹ The same delineation has also been codified by some states in their statutory schemes. See for example, 6 Mont. Code Ann. § 46-13-301 (1981). That statute requires a judge to determine the voluntariness of a defendant's confession or admission. Section (5) of the statute provides, "The issue of the admissibility of the confession or admission may not be submitted to the jury. If the confession or admission is determined to be admissible, the circumstances surrounding the making of the confession or admission may be submitted to the jury as bearing upon the credibility or the weight to be given to the confession or admission."

the exclusion of confessions from evidence. The respondent's examination of earlier authorities leads it to conclude that, "The scope of inquiry was by definition based upon the *reliability* or trustworthiness of the confession." (Respondent's Brief, p. 15; emphasis by respondent). Thus, the respondent argues that the function of the judge was different than it is now because the judge had to be concerned with the reliability of a confession as a factor in determining its admissibility (Respondent's Brief, p. 16). From its analysis of the further evolution of the law governing the admissibility of confessions, the respondent concludes that evidence surrounding the procurement of a confession can be excluded from the jury's consideration because it relates solely to the question of voluntariness, which is an issue independent of the confession's reliability and credibility.

Although the voluntariness of a confession is determined without regard for its truth or falsity,² that does not support the conclusion reached by the respondent. Indeed, it is even more imperative that the jury be apprised of all the circumstances surrounding the procurement of a confession because the judge does not consider the reliability of the confession in making a voluntariness determination. If the function of the judge in a voluntariness hearing is completely independent from a determination of the reliability of a confession, then it becomes even more important that the latter task be undertaken by the jury. The jury's traditional role in assessing the credibility of evidence is in no way diminished by an independent determination of a confession's voluntariness. As the Court has noted, "Nothing in *Jack-*

² *Jackson v. Denno*, 378 U.S. 368, 376-377 (1964); *Lego v. Twomey*, 404 U.S. 477, 484-485 (1972).

son questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence." *Lego v. Twomey*, 404 U.S. 477, 486 (1972). Thus, the respondent's conclusion that evidence surrounding procurement of a confession cannot be considered by juries in determining its credibility and the weight it should be given, draws no support from the decisions of this Court.

Moreover, the respondent's position ignores the fact that the voluntariness determination serves a purpose that is entirely different from the jury's duty to weigh and assess the credibility of the evidence. See *United States v. Raddatz*, 447 U.S. 667, 679 (1980). The respondent's argument reflects the same mistrust of juries and their ability to properly use evidence that was articulated by the Kentucky Supreme Court. *Crane v. Commonwealth*, Ky., 690 S.W.2d 753, 754-755 (1985) (J.A. 71-72). There is no rational basis upon which to exclude evidence from the jury's consideration simply because a trial judge must put it to a different use than that of the jury. The weakness of the respondent's position is seen in the universal acceptance of the "multiple admissibility" rule. See I Wigmore, *Evidence*, § 13, p. 694 (Tillers Rev. 1983). The widespread recognition of that rule is a strong indication that juries possess the intelligence and sophistication to make proper use of evidence. Although the principle enunciated by the Kentucky Supreme Court in the case at bar may be deemed an extension of the orthodox rule, there is nothing logical about it because it not only abridges rights guaranteed by the Sixth and Fourteenth Amendments, but it also demeans the jury's role in a criminal trial.

Contrary to the respondent's assertion,³ the petitioner is not seeking relitigation of the voluntariness issue. The respondent concedes that the petitioner is entitled to have the jury disbelieve the confession because "an impressionable child 'made up' a story to please the police." (Respondent's Brief, p. 18). Yet how can a jury properly determine the reliability of a confession without being fully apprised of the circumstances surrounding its procurement? While conceding the legitimacy of the petitioner's ultimate objective, the respondent's position deprives the petitioner of the only means by which he can attain his objective. Indeed, the restrictions urged by the respondent's position overlook the fundamental difference between the voluntariness issue and the determination of a confession's reliability and credibility. The former deals only with admissibility of evidence while the latter is an integral aspect of the search for the truth.⁴ The limitations which the respondent seeks to impose upon the petitioner's ability to challenge the credibility of a confession unduly restrict his due process right to present a defense and his rights to trial by jury and confrontation and cross-examination. "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, ___ U.S. ___, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984). The constraints urged by the

³ Respondent's Brief, pp. 18-19.

⁴ This is, of course, the same distinction between the purpose of a suppression hearing and the trial itself.

respondent herein prevent the petitioner from presenting a "complete defense" and should, therefore, be rejected.

IA(a)-(c)

ARGUMENT THAT THERE IS NO PREJUDICIAL RESTRICTION OF RIGHTS GUARANTEED BY THE SIXTH AMENDMENT AND THAT THERE ARE SOUND POLICY CONSIDERATIONS UNDERLYING THE CRANE RULE.

The effect of the rule enunciated by the Kentucky Supreme Court is to exclude evidence of *all* circumstances surrounding procurement of a confession.⁵ After acknowledging that evidence of voluntariness and evidence of credibility are difficult to separate, the Kentucky court, without providing any guidance by which to determine whether evidence pertains only to voluntariness or to credibility, removes the entire issue from the jury's consideration. *Crane*, 690 S.W.2d at 754-755 (J.A. 71-72). As noted above, this result is in part justified by the court's belief that jurors are incapable of making proper use of the evidence. *Id.* at 755. (J.A. 72). The Kentucky Supreme Court apparently limits evidence of credibility to mistakes of fact contained within the body of the confession. That categorization is unduly restrictive to the point of being unconstitutional because evidence surrounding the circumstances under which a confession is obtained is directly related to the confession's credibility and reliability. Surely evidence of the number of police officers present during an interrogation and the conditions under which the confession is procured is germane

⁵ There can be no doubt that this is also the position advocated by the respondent. "If the trial court rules the confession voluntary and admits it into evidence, *none* of the circumstances surrounding its procurement are relevant to credibility." (Respondent's Brief, p. 29; emphasis by respondent).

to the issue of whether the confession is found by the jury to be credible and reliable. Such evidence cannot be constitutionally excluded on the ground that it also relates to a confession's voluntariness.

IB

ARGUMENT THAT CRANE RULE IS BASED UPON RECOGNITION THAT DIFFERENT EVIDENCE MAY BE REQUIRED TO DECIDE A QUESTION OF LAW VERSUS A QUESTION OF FACT.

On p. 31 of its brief the respondent seems to suggest that jury questions regarding a confession's authenticity and credibility arise only when a defendant denies making a confession. Such a notion cannot withstand constitutional scrutiny. A defendant's due process right to present a complete defense necessarily encompasses the ability to challenge not only the substance of the confession itself but also those aspects of the interrogation process which lend themselves to the issue of the confession's believability.

Common sense dictates that the circumstances surrounding procurement of a confession are indeed relevant to its credibility. If, as in the case at bar, there are substantial factual misstatements and inaccuracies in the confession itself, then there must be some explanation as to why those statements were made. One explanation which the petitioner unsuccessfully sought to present at trial, was that the circumstances surrounding the interrogation caused the petitioner, a sixteen year old boy, to make untrue statements in an effort to please the police. The ultimate question for the jury to decide was whether it could find the confession to be reliable and credible when it was obtained from a sixteen year old boy who was interrogated for an hour and forty minutes in an eight foot

by twelve foot, windowless room with several police officers present. (J.A. 23-24, 46-47, 49-50). An equally important issue was how much weight should be attributed to such a confession. Therein lies the significance of the evidence sought to be introduced by the defense. The relevancy of those facts to the issue of the confession's credibility is readily apparent.

The respondent correctly notes that the petitioner on p. 40 of his brief states that "the Sixth and Fourteenth Amendments are violated by a rule of law that precludes a defendant from submitting to the jury the issue of the voluntariness of his confession." That sentence, however, is in error and should have read that the Sixth and Fourteenth Amendments are violated where, as here, the jury is not permitted to hear evidence of the circumstances surrounding procurement of the confession for the purpose of assessing the credibility of the confession and the weight it is to be given. This is the position the petitioner has steadfastly maintained in his original brief and in this brief. The issue of whether the Constitution requires that a jury determine the voluntariness of a confession is not before the Court and is not the question presented in the case at bar. The petitioner did not intend p. 40 of his original brief to convey otherwise. While it is true that the same evidence may be used to establish not only a confession's voluntariness but also its credibility, a trial judge's independent determination of a confession's voluntariness cannot constitutionally preclude a jury from using the same evidence to determine its credibility and the weight it is to be afforded. For the reasons set forth in his original brief, the petitioner maintains that a defendant is stripped of his rights to present a complete defense, to be tried by a jury, and to confront and cross-examine the witnesses against him if the jury is prevented from

hearing evidence about the circumstances surrounding procurement of a confession simply because such evidence is used to establish the voluntariness of a confession.

As the petitioner noted in his original brief, the voluntariness of a confession and hence its admissibility is determined by the preponderance of the evidence standard. To exclude that evidence from the jury's function of determining the confession's credibility and weight effectively insulates that evidence from application of the reasonable doubt standard. This result stems directly from the *Crane* rule and is, therefore, an aspect of the case which can appropriately be brought to the Court's attention. The credibility of evidence is relevant to the issue of guilt or innocence.⁶ Thus, a rule which does not subject such evidence to the reasonable doubt standard is unconstitutional.

Contrary to the respondent's assertion, *Lego v. Twomey* is not dispositive of the issue presented herein because that case held that the Constitution only requires the voluntariness of a confession be determined by a preponderance of the evidence. The credibility and weight to be given a confession by the jury is evidence to be subjected to the reasonable doubt standard.

II

ARGUMENT THAT ERROR IS HARMLESS BEYOND A REASONABLE DOUBT.

The harmless error standard articulated in *Chapman v. California*, 386 U.S. 18 (1967), places upon the prosecu-

⁶ In the context of discussing the distinction between a suppression hearing and a trial, the Florida Supreme Court has stated, "[T]he inquiry at the pretrial hearing on the admissibility of a confession is primarily the question of voluntariness; later, before the jury, the question is what weight to give the confession in determining guilt." *Palmes v. State*, 397 So.2d at 653.

tion the burden of establishing that the asserted error did not contribute to the defendant's conviction. In other words, it must be demonstrated that the error is harmless beyond a reasonable doubt. *Id.* at 24. The respondent cannot meet its burden in the case at bar.⁷

The evidence of guilt is not overwhelming. There was no physical evidence connecting the petitioner to the crime. (TE V 12, 31-33). The evidence of guilt consisted of the petitioner's confession, the statement of the co-defendant, George Howard Williams, the petitioner's uncle, and a statement allegedly made by the petitioner to his mother. (TE IV 8-19, 62).⁸ This evidence cannot be deemed overwhelming. The theory of the defense was that the petitioner's confession was untrustworthy and

⁷ In arguing that the error is harmless, the respondent cites *Harrington v. California*, 395 U.S. 250 (1969) and *Milton v. Wainwright*, 407 U.S. 371 (1972), for the proposition that even a coerced confession can constitute harmless error (Respondent's Brief, p. 37). The respondent misinterprets both cases.

Harrington found a violation of *Bruton v. United States*, 391 U.S. 123 (1968), to be harmless error, while the Court in *Milton* held a violation of *Massiah v. United States*, 377 U.S. 201 (1964), to constitute harmless error. Indeed, the Court in *Chapman v. California*, 386 U.S. 18 (1967), citing *Payne v. Arkansas*, 356 U.S. 560 (1958), noted that a coerced confession cannot be treated as harmless error because it is such a fundamental infringement of the right to a fair trial. *Chapman*, 386 U.S. at 23, n.8. That very point was also noted in *United States v. Hasting*, 461 U.S. 499, 508, n.6 (1983).

⁸ Williams testified that he didn't know anything about the incident at the Keg Liquor Store. He said he told the police only what they wanted him to say (TE III 15-16). Mrs. Crane said she couldn't remember what she told the police (TE IV 56-57). In conformance with Kentucky procedure, police officers were then allowed to testify as to the substance of the statements made by Williams and Mrs. Crane (TE IV 8-19, 62). See *Jett v. Commonwealth*, Ky., 436 S.W.2d 788 (1969).

unreliable. To support this claim the defense presented evidence of factual inaccuracies and inconsistencies contained within the confession.⁹ The doubt raised as to the credibility of the petitioner's confession to the police would likewise have raised doubts as to the believability of the statement he purportedly made to his mother because it was shown that the petitioner had a propensity to confess to crimes which he had not committed. (J.A. 4, 7, 9-10). Although Williams' statement implicated the petitioner as the person who killed the liquor store clerk (TE III 10-13), it has been previously noted in the Petitioner's Brief (p. 24) that Williams had obvious motivation to protect himself and depreciate the level of his culpability.¹⁰ Beyond that, the credibility of the testimony of a convicted felon is inherently unreliable. (TE III 46-47).¹¹ The credibility of all of the foregoing statements is, therefore, in doubt. Accordingly, such evidence cannot be considered overwhelming.

The respondent argues that the error must be deemed harmless because most of what was excluded was eventually heard by the jury. (Respondent's Brief, pp. 38-39). The nature of this argument suggests that the respondent acknowledges the correctness of the point made in the Petitioner's Brief (p. 38, n. 28) that jurors would not find the confession to be untrustworthy because exclusion of evidence of the circumstances surrounding procurement

⁹ *Crane v. Commonwealth*, Ky., 690 S.W.2d 753, 755 (1985); (J.A. 71).

¹⁰ Williams received a twenty (20) year sentence in connection with the robbery at the liquor store (TE III, 47, 51-53).

¹¹ See *Cotton v. Commonwealth*, Ky., 454 S.W.2d 698 (1970), which was in effect at the time of trial in the case at bar; *Commonwealth v. Richardson*, Ky., 674 S.W.2d 515 (1984).

of the confession would prevent them from having an evidentiary foundation upon which to reach that conclusion. The respondent's harmless error argument is flawed in an even more fundamental respect because it fails to draw any distinction between mere general inferences a jury may draw during the course of a trial and evidence which is actually presented in the manner intended by the adversarial process.

To effectuate his right to present a defense, a criminal defendant must be allowed to present his case in a manner designed to guarantee that the jury has the opportunity to consider the evidence in terms of the theory of the defense. The right to present a defense is little more than a fiction unless defense counsel is provided a meaningful opportunity to effectively present evidence favorable to his client. This objective cannot be attained where, as here, evidence favorable to the defense may be only incidentally or tangentially disclosed in the course of presenting proof. In such situations, it can only be speculated what, if anything, the jury might have inferred or gleaned from all that was said and done in the courtroom. That anomalous situation hardly squares with the right to present a defense. Indeed, it is implicit within the right to present a defense that counsel be allowed to shape, mold and present the evidence in such a way that the jury is undoubtedly given the opportunity to apply it to the theory of the defense. A meaningful opportunity to effectuate the right to present a defense is affirmative in nature, i.e., counsel must be able to present his client's case so that it can be understood by the jury and considered in terms of the totality of the evidence. This is the essence of the adversarial system and thus operates as an assurance that trial by jury does indeed become a search for the truth.

The right to confront and cross-examine witnesses, as well as the right to present a closing argument,¹² are essential components of the right to present a defense. Here, the ruling of the trial court that the petitioner was precluded from challenging the credibility of his confession by introducing evidence that was equally relevant to the voluntariness issue, left defense counsel without the ability to effectively present his theory of defense. He was prevented from cross-examining police officers as to the circumstances surrounding procurement of the confession and he was denied the opportunity of arguing to the jury that such evidence and the reasonable inferences therefrom supported his theory that the confession was not worthy of being believed. Although defense counsel was permitted to present a defense based on the factual inaccuracies and misstatements contained in the confession, that only conveyed part of the defense to the jury. The petitioner was precluded from presenting a crucial aspect of his defense upon which the foundation and strength of the entire defense depended.

Unable to present his entire defense to the jury, the petitioner was forced to content himself with the hope that the jury would not only construct the remainder of his defense from what it heard in the court room but also draw the correct inferences therefrom. The right to present a defense cannot be relegated to a game of chance in which the defendant must hope that his case and the evidence in support thereof is properly considered by the jury.

The substantial infringement on the petitioner's right to present a defense and his right to fully confront and

¹² *Herring v. New York*, 422 U.S. 853 (1975).

cross-examine witnesses prevents the error herein from being harmless beyond a reasonable doubt.

CONCLUSION

The arguments made by the respondent neither dissipate the strength of the arguments presented in the Petitioner's Brief nor justify affirmance of the decision of the Kentucky Supreme Court. Accordingly, the petitioner, Major Crane, respectfully urges the Court to adopt the constitutional rule advocated in his original brief and grant him the relief requested therein.

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ADDENDUM

ADDENDUM TO APPENDICES

Since the filing of his original brief, the petitioner has found that Montana, by operation of a state statute, should be included in the list of orthodox rule jurisdictions which admit into evidence the circumstances surrounding procurement of a confession. Accordingly, Montana should be included in Appendix A(1) making a total of twenty-seven (27) jurisdictions listed therein. The pertinent section of the Montana Statutes, i.e. 6 Mont. Code Ann. § 46-13-301 (1981) should be included in Appendix B(1).

It should also be noted that South Carolina, which is a Massachusetts rule jurisdiction, has recently re-affirmed its position in *State v. Drayton*, 337 S.E.2d 216 (S.C. 1985). The *Drayton* case should, therefore, be included in Appendix B(4).